



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1068]

Certain Microfluidic Devices; Notice of Request for Supplemental Submissions from the Parties and Interested Members of the Public and Interested Government Agencies; Extension of Target Date

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (the “Commission”) is requesting supplemental submissions from the parties and interested members of the public and interested government agencies. The target date in this investigation has been extended to August 15, 2019.

FOR FURTHER INFORMATION CONTACT: Ron Traud, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-3427. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<https://www.usitc.gov>). The public record for this investigation may be viewed on the Commission’s Electronic Docket Information System (“EDIS”) (<https://edis.usitc.gov>). Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: On September 6, 2017, the Commission instituted this investigation based on a complaint filed by Bio-Rad Laboratories, Inc. of Hercules, California (“Bio-Rad”) and Lawrence Livermore National Security, LLC of Livermore, California (collectively, “Complainants”). 82 FR 42115 (Sept. 6, 2017). Complainants alleged a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), by 10X Genomics, Inc. of Pleasanton, California (“10X”) based on its importation into the United States of certain microfluidic devices asserted to infringe one or more claims of U.S. Patent Nos. 9,500,664; 9,636,682; 9,649,635; and 9,126,160. *Id.* The Office of Unfair Import Investigations was also named as a party in this investigation. *Id.* The Commission also directed the ALJ to take evidence and hear arguments regarding the public interest and provide the Commission with findings of fact and a recommended determination on the statutory public interest factors, as requested by 10X. *Id.*

On September 20, 2018, the presiding administrative law judge (“ALJ”) issued a final initial determination finding that 10X violated section 337 through its importation of its GEM-Q and GEM-U Chips (collectively, the “GEM Chips”). However, the ALJ found no violation by 10X based on its importation of its Chip SE or Chip GB.

On September 28, 2018, the ALJ issued a recommended determination on remedy, bonding, and the public interest (the “RD”). The ALJ recommended that, if the Commission finds a violation of section 337, it should issue a limited exclusion order (“LEO”) against infringing microfluidic devices, which are imported, sold for importation, and/or sold after importation by 10X. The LEO would prevent the importation by 10X of microfluidic devices that infringe Complainants’ asserted patents. The ALJ further recommended that, if the Commission finds a violation of section 337, it should issue a cease and desist order (“CDO”)

against 10X. The CDO would prevent the transfer by 10X to others of microfluidic devices that infringe Complainants' asserted patents. The ALJ found that "the public interest factors weigh in favor of imposition of the recommended remedial orders." RD at 30.

On December 4, 2018, the Commission determined to review the ALJ's findings as to the GEM Chips, the Chip SE, and the Chip GB. 83 FR 63672 (Dec. 11, 2018). Accordingly, the Commission may find a section 337 violation and issue an LEO or CDO or both relating to any or all of those products. However, prior to issuing remedial orders, the Commission must consider the effect of those remedial orders on the public interest. 19 U.S.C. 1337(d)(1), (f)(1). Given the current record, the Commission is requesting additional information regarding the public interest from the parties, interested members of the public, and government agencies.

The parties, interested members of the public, and interested government agencies are requested to provide statements and comments on the following public interest issues. The Commission is particularly interested in responses that include detailed information regarding specific research projects being conducted in the United States as of the date of this Notice.

- (1) For current research projects being conducted in the United States, please provide the following information:
 - a. Please quantify and explain what, if any, research setbacks (such as loss of time, money, samples, or usable data) would occur if the specific current research project(s) were required to be switched from 10X's GEM Chips to another system.

- b. Please explain and quantify the extent to which the Chip SE could replace the GEM Chips in the current ongoing research project(s) discussed above.
 - c. To what extent would delaying the effect of any exclusion or cease and desist order covering 10X's GEM Chips ameliorate or prevent such setbacks for the specific research project(s)? How long of a delay in the effective date of a remedial order would be necessary to allow the specific ongoing research project(s) to continue to completion with 10X's GEM Chips?
- (2) Are there research areas for which 10X's GEM Chips used with 10X's Chromium Controllers are the only acceptable research platform? If so, why are alternative products not acceptable?
- (3) If the Commission were to tailor its remedial orders to allow researchers using the GEM Chips in the United States as of the date of this Notice to continue to receive the GEM Chips:
- a. Please provide proposed remedial order language for a certification that would permit only imports for researchers who have a documented need to continue to receive the GEM Chips for a specific current research project that cannot be met by any alternative product, including the Chip SE.
 - b. Please explain how your proposed language for that exception allows the continued receipt of the GEM Chips by those U.S. researchers only for

research ongoing as of the date of this Notice and only until the completion of that research.

- c. Please include examples of the types of documentation that you contend would support the requirements above, and which correspond to your proposed remedial order language.

(4) If the Commission were to tailor any remedial order to allow receipt of the GEM Chips by researchers in the United States who will begin research for which the GEM Chips are the only acceptable option to perform that research:

- a. Please provide proposed remedial order language for a certification that would permit only imports for researchers who have a documented need to receive the GEM Chips for a specific research project that cannot be met by any alternative product, including the Chip SE.
- b. Please explain how your proposed language for that exception allows the receipt of the GEM Chips only for such research and only until the completion of that research.
- c. Please include examples of the types of documentation that you contend would support the requirements above, and which correspond to your proposed remedial order language.

(5) In its initial public interest submission to the Commission, 10X requested the Commission to delegate public interest to the ALJ to “permit development of

the evidentiary record to ensure that these public interest issues are properly addressed.” 10X Sub. at 5 (Aug. 14, 2017). The parties are requested to respond to the following:

- a. Why did the parties fail to develop the evidentiary record in the hearing before the ALJ to include specific information and statements from third-party researchers of the sort that were included in 10X’s exhibits 7 and 8 in its January 30, 2019 Response to Written Submissions Pursuant to Commission’s December 4, 2018 Notice?
 - b. How should Commission Rule 210.4(c)(1) apply to 10X’s filing of its exhibits 7 and 8 and related argument in its January 30, 2019 Response to Written Submissions Pursuant to Commission’s December 4, 2018 Notice?
 - c. If a sanction is warranted under Commission Rule 210.4(d), who should be sanctioned, what should that sanction be, and what procedure should be followed to impose such sanction, if any?
- (6) 10X is requested to supply the following:
- a. A list of current U.S. customers of its GEM Chips; the specific research project(s) being performed as of the date of this Notice by each customer; the amount of GEM Chips supplied to each U.S. customer per month; and the estimated date for the completion of the research project(s) using those chips.

- b. An update on the timeline for availability of the Chip SE to its customers in commercial quantities.

The Commission has additionally determined to extend the target date in this investigation to August 15, 2019.

Written Submissions: The parties to the investigation are requested to file opening and reply written submissions on the issues identified in this Notice. The parties' opening written submissions must be filed no later than close of business on June 24, 2019. The parties' reply submissions must be filed no later than the close of business on July 1, 2019. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Interested members of the public and interested government agencies are also requested to file submissions to certain issues identified in this Notice. Members of the public and government agencies must file their statements and comments no later than the close of business on July 1, 2019.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-1068") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000). Any person desiring to submit a

document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: June 10, 2019.

Lisa Barton,
Secretary to the Commission.